No. 20,270

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HARRAH'S CLUB, RESPONDENT

On Petition for Enforcement of an Order of the National Labor Relations Board

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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INDEX

AUTHORITIES CITED

Cases: Page

Cases—Continued Page

Cases—Continued Page

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*),[1] to enforce its order issued against respondent Harrah's Club, on February 12, 1965. The

[1] The pertinent statutory provisions are reprinted *infra*, pp. 57-59.

Board's decision and order (R. 57-58, 48-50)[2] are reported at 150 NLRB No. 169. This Court has jurisdiction of the proceeding, the unfair labor practices having occurred in Stateline, Nevada, where respondent operates gambling casinos and restaurants.

STATEMENT OF THE CASE

I. The Board's findings of fact

The Board found that respondent is engaged in commerce within the meaning of the Act; that it violated Section 8(a)(1) of the Act by coercively interrogating its employees regarding their union activities, threatening them with reprisals because of such activities, and soliciting them to abandon the Union[3] as their collective bargaining representative and deal directly with management; and that it violated Section 8(a)(3) and (1) of the Act by discharging employee Robert Wetherill because of his union activities. The facts upon which the Board's findings are based are summarized below.

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[2] References to the pleadings, decision and order of the Board, and other papers reproduced as "Volume I, Pleadings," are designated "R". References to portions of the stenographic transcript reproduced pursuant to Court Rules 10 and 17 are designated "Tr." References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. References designated "GCX", "RX", or "CPX" are to exhibits of the General Counsel, respondent, or the charging party, respectively.

[3] International Alliance of Theatrical Stage Employees and Motion Picture Operators of the United States and Canada, Local 363, AFL-CIO.

A. *The business of respondent*

Respondent, a Nevada corporation with its main offices in Reno, is engaged in the business of owning and operating restaurants and gambling casinos in Reno and Stateline, Nevada. During its past fiscal year, respondent purchased and received materials valued in excess of $50,000 directly from points and places outside Nevada; and during the same period, respondent sold goods and services at retail in excess of $500,000 valuation (R. 14; Tr. 321-322, 5-6).

The largest operation in the Harrah's complex is Harrah's Tahoe, located at Lake Tahoe in Stateline, Nevada. It contains the South Shore Room, a theatre-restaurant which accommodates 700 guests and features many of the outstanding performers in the entertainment field. This proceeding concerns the stage technicians who provide the technical services for stage productions in the South Shore Room (R. 14-15).

B. *Respondent opposes the Union organizational campaign*

Early in June 1963, Robert H. Wetherill, a stage technician at the South Shore Room, became an unpaid business agent of the Union (R. 16; Tr. 14). He notified respondent's officials of his position (R. 37; Tr. 14, 18, 389) and shortly thereafter began to organize the stage crew (R. 16; Tr. 19). By August 9, Wetherill had organized a majority of the stage crew, and on that date he sent a telegram to Robert Brigham, respondent's Director of Industrial Relations, demanding recognition. Wetherill received no

reply from Brigham, and on August 14 he filed a petition for representation with the Board (R. 16; Tr. 19-22).

Several days after the petition was filed, Stage Manager Sy Lein and Lighting Director James Vogt told Wetherill that they had been called into the office and were asked what they knew about the petition (R. 16; Tr. 24-25). Lein said they had been "flabbergasted" at learning of the petition, and asked Wetherill why he had not told them. Wetherill told Lein that he did not trust him (R. 16; Tr. 24, 26). Later Wetherill told Vogt that he had not informed him about the petition because Vogt was "too close" to Lein, and he felt he could not trust him either (R. 16; Tr. 26, 642). Vogt replied that he carried a card for the Union, which he respected, and that he would "never stab him in the back" (R. 16; Tr. 643). Vogt added, however, that "You will never keep 14 men working here if you go union or have a contract" (R. 16; Tr. 27).

Lein complained to stage technician Bruce Lovelady that the employees "sure threw him a curve." He explained that he and Vogt had just returned from a meeting with management, and that management had found it incredible that Lein and Vogt had not known in advance about the filing of the petition (R. 16; Tr. 71). Vogt also remarked to Lovelady that the employees had "put him in hot water" by "springing this petition on us" (R. 16; Tr. 72, 648). He explained that he and Lein "were raked over the coals up in a meeting and nobody believed that we didn't know anything about it" (R. 16; Tr. 72).

During this same period, Lein informed Lovelady that "as far as management was concerned they wouldn't trust Bob Wetherill anymore" (R. 16; Tr. 76). When Lovelady asked why, Lein said that Wetherill "had stabbed them in the back" by filing the petition "after all we had done for him" (R. 16-17; Tr. 76-77). Shortly thereafter, on September 1, 1963, Wetherill was discharged (R. 38; Tr. 27-29).

On September 5, a conference was held at the Board office in San Francisco in connection with the representation petition. Several management officials attended the conference, as did employee Lovelady (R. 17; Tr. 83-84). During a break in the conference, respondent Producer Barkow asked Lovelady if he was aware that the Union required stagehands to pass tests in order to qualify for membership, adding that he did not believe the stagehands at Harrah's would be able to pass these tests (R. 17; Tr. 84-85). Barkow further ventured that even if the stagehands were successful in passing these tests, it would be unlikely that they would be accepted for membership by the Local; and that even if they overcame that obstacle, it was doubtful that the International would admit them to membership (R. 17; Tr. 85, 713).

The following evening, Lein asked Lovelady what had occurred at the conference (R. 17; Tr. 86, 597). Lovelady told him, and Lein remarked, "I guess you know because you were at the hearing—management thinks you are on the Union side" (R. 17; Tr. 86, 597). Lovelady protested that the hearing was open to the public, and that his attendance should not be

taken to mean he was on either side. Lein remarked, "Nonetheless, they think you are on the Union's side" (R. 17; Tr. 87).

On September 9, Lein told Lovelady that the stage technicians "would be crazy to vote for the Union"; that if the employees "brought the Union in at this time" they would have "less job security" than they currently had. He explained that all the current employees "would probably not all be kept on, that they would work like any union contract where they would have four major men. In other words, your head carpenter, your head electrician and head propman and head fly man . . . the rest of the men would be brought in from the Union hall" (R. 17-18; Tr. 74-76, 116).

On the morning of September 9, Barkow approached employee Rux in the cafeteria and said, "You know the crew will be cut back because of the union activity" (R. 18; Tr. 300). Rux answered that he did not know this, and Barkow said, "Well, you realize, of course, that the crew does not have to be as big because of a union contract" *(ibid.)*. When Rux acknowledged that he was also not aware of that, Barkow rejoined, "Well, there are still things to be seen from this" (R. 18; Tr. 300-301). Barkow further told Rux that even though the employees had signed union cards, they could still "vote no" in the election, and that it "could be advantageous" to them if they did (R. 18; Tr. 301).

About September 12, Lovelady and Lein were together on stage between shows. Lein said, "I guess you know that some of the men in the crew are going

to have a pretty difficult time working if this union contract thing goes through" (R. 18; Tr. 109-110, 599). Lein said that as stage manager he could reject any stagehand dispatched from the union hall (R. 18; Tr. 109-110, 599-600). Lovelady asserted that he could not do so without good cause, and Lein replied, "I can think of many things" (R. 18; Tr. 110). When Lovelady asked what he meant, Lein used employee Monty Norman as an example, pointing out that he was already familiar with this man's capabilities. He said that if Norman were dispatched from the hiring hall, he could reject him on the grounds that he considered him an incompetent, and could request a man he was "willing to take a chance on," even though he was not familiar with his capabilities. Lein suggested that Lovelady give that some thought (R. 18; Tr. 110-111).

On the night of September 13, Charles Walker, a returning veteran who had replaced Wetherill, went to Barkow's office on a personal matter. After the matter was disposed of, Barkow detained Walker. Barkow asked him if he had heard about "this union deal," and how he "felt about it" (R. 19; Tr. 185). Walker replied that he had only "heard and seen one side of the picture" and was reserving judgment. Barkow then said, "I understand that it's kind of hard to get into the Union and that they give a test of some kind. As you yourself know, they can always put a question in that even the best prepared man would fail" (R. 19; Tr. 185-186). Barkow asked Walker if he had had any previous dealings with a union. Walker related three separate experi-

ences, from which Barkow concluded that Walker had been "on both sides of the fence," and asked him to explain this (R. 19; Tr. 186-187). Walker explained that in his past experiences he had been in favor of the union where there was a skilled trade, but not where there was an unskilled trade (Tr. 187-188). During this discussion, Barkow referred to Walker's previously expressed desire to become part of management. Barkow suggested that Walker take the matter up with Brigham, who was more familiar with the availability of those jobs, and volunteered to let Walker know when it would be opportune for him to talk to Brigham (R. 19; Tr. 186).

On September 13, a meeting of the Board of Review [4] was scheduled in the conference room at the Club to consider a grievance filed by Wetherill in relation to his discharge. Brigham, Assistant Club Manager Clever, and Rux, substituting for Lovelady, comprised the Board (R. 19-20; Tr. 301-302, 305). Due to a failure of communication, Wetherill did not appear for the meeting (R. 20, 39; Tr. 320, 349). Clever left the room to ascertain if Wetherill had arrived and during his absence Brigham asked Rux whether he had been approached to join the Union

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[4] The Board of Review was set up by the respondent to deal with "all types of problems," but primarily handled grievances. It consisted of three voting members—a representative of the Club Manager, a representative of the Director of Industrial Relations, and an employee representative elected by the employees (R. 38, n. 40; Tr. 31-32). Lovelady was the employee representative, with Rux as the alternate (Tr. 32, 305).

(R. 20; Tr. 302). When Rux answered affirmatively, Brigham asked him if he knew anything about unions. Rux first replied in the negative, but added that he knew "something" about unions (R. 20; Tr. 302). Brigham told Rux that "the Union was . . . a father and son organization" (R. 20; Tr. 303). Brigham explained that a stagehand could not join the Union unless his father was a member, and that applicants for membership would be required to undergo extensive tests which the stage crew at the Club might not be able to pass (R. 20; Tr. 303). Brigham also told Rux that it was his understanding that under union regulations a member of one local, with more union seniority than a member of a local with which the crew at the Club might be affiliated, could "bump" the crew member from his job at the Club (R. 20; Tr. 304). He also remarked that he considered that any crew member who joined a union was either a "weakling and afraid of his job with the possibility of being fired or he knew he needed the Union for a crutch to lean on" (R. 20; Tr. 304-305).

C. *The Union wins the election; respondent continues its opposition*

On October 14, the Union won the election in the stipulated unit[5] by 11 votes to none, with 1 ballot challenged (R. 15; GCX 2(c)).

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[5] The appropriate unit as described in the stipulation is as follows:

> All stage technicians, apprentice stage technicians and sound console operator in the South Shore Room employed by Harrah's Club at Lake Tahoe; excluding all

On the evening following the election, some of the stage crew were having a snack in the employees' cafeteria, where they got food at a discount (R. 22; Tr. 192, 206). Brigham approached their table, pointed at the food and coffee there, and remarked, "This is one of the things we will be bargaining for" (R. 22; Tr. 192). He continued, "I have just been made a fool of and I don't like it. I am here so you will know who I am and I will know who you are" *(ibid.)*. One of the group asked him what he meant by his remarks, and Brigham said, "It may take me six to eight months to get even, but I will," and he pointed to each member of the group, calling him by name *(ibid.)*.

Other members of the stage crew were seated at a nearby table. One of them, Richard Ponts, could not hear Brigham but observed him pointing at the men at the table (R. 22; Tr. 293-294). Ponts saw Brigham return to his own table briefly, then start to leave. As he approached the exit, Brigham turned and pointed to Ponts' table and called out, "I will get them too" (R. 22; Tr. 294-296).

Vice-President Andreotti notified Brigham shortly thereafter that a member of the crew, Murray, had complained that Brigham had "threatened" the men (R. 24; Tr. 379). The following evening, October 16,

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other employees, guards and supervisors as defined in the Act.

It was further stipulated that the inclusion of the sound console operator, and his eligibility to vote in the election, were not to be binding upon the employer in any other matter or proceeding (R. 15, n. 5; GCX 2(b)).

Brigham encountered crew members Ponts and McNerthney at the Club (R. 24; Tr. 297, 383). Brigham told them that there seemed to be some misunderstanding about the remarks he had made in the cafeteria (R. 24; Tr. 297, 383). Brigham said he had been unjustly accused of threatening the men, and that if he had been of a mind to threaten the crew he would have done so, adding that he did not say "what he felt or could have said" (R. 24; Tr. 297). Ponts insisted that Brigham had threatened them, and Brigham replied, "What I said [that] may have been construed as a threat was that the crew would be reduced in the next couple of months and that the next eight to ten months would prove to be highly educational" (R. 24; Tr. 297). He added that he did not "know how he personally could get even with anybody, but the whole thing would be proven out in the next months to follow, as the crew was cut back from 30 to 40 per cent" (R. 24; Tr. 297-298).

The next night, October 17, Brigham went to the cafeteria where he found a group of the stage crew. He said that he had been told that he had cursed and threatened them, and that he did not believe that he had, but that he wanted to apologize if he had done either (R. 25; Tr. 95-96). Stagehand Jordan interrupted Brigham and said, "You didn't curse us. You threatened us" (R. 25; Tr. 96). Brigham exclaimed, "If I did not then, I do it [now]. I am a vindictive man, and believe me, what I said still goes. Within six to eight months this crew will be reduced 30 to 50 per cent" (R. 25; Tr. 96).

During this same period, Director of Entertainment Vincent phoned Lovelady at his home and asked him to come to the Club to discuss the Board election. Vincent said he wanted to ask some questions and that he regarded Lovelady "a good sounding board for the crew" (R. 26; Tr. 102). Lovelady consented and met in Vincent's office that afternoon. Vincent asked Lovelady where had management gone wrong to "force 11 men to vote unanimously for union representation" (R. 26; Tr. 103). Lovelady told Vincent that he had been asked not to make any statements, but he did point out that many informal grievances discussed at production meetings had gone unredressed (R. 26; Tr. 103). Vincent acknowledged these problems, but told Lovelady that he did not believe they were sufficiently important to cause 11 men to vote for the Union (R. 26; Tr. 104). Vincent asked Lovelady what the Union had promised them, and Lovelady replied, "The Union promised us nothing" (R. 26; Tr. 104). At Vincent's expressed disbelief, Lovelady explained that the men were intelligent enough to know that neither the Union nor management could make "outright promises" and that improvements would have to be negotiated (R. 26; Tr. 104). Vincent said, "Well, maybe they are just better talkers than we are" *(ibid.)*. He then asked, "Are you aware that we would have done anything to have stopped this Union thing?" adding that management would have discharged Barkow, Lein, or Vogt if necessary. He asked, "Why didn't you come to us before all of this took place?" Lovelady reminded

him that the men had voiced their complaints without satisfaction (R. 26; Tr. 104-105).

Vincent told Lovelady that "Mr. Harrah was basically against all unions, that he did not want any part of this or any other union, that he had worked long and hard for his business and had gotten it where it was today and he felt that he had the right to run it and control it the way he wanted it without outside interference" (R. 26; Tr. 105).

Vincent took this occasion to ask Lovelady whether he was aware that "Bob Wetherill came up here . . . begging us for a job?" He continued, "When he came up here he needed a job. He was all but begging for a job. We gave him a job. Then when he got sick we paid him during all of his sickness and then, he turned around and did this thing to us. . . It's the same thing as if I had invited him into my house and he [seduced] [6] my wife. It is something I will never forget and forgive him for" (R. 26; Tr. 106).

Later that night Vincent sent for Walker after the first show (R. 27; Tr. 193, 583). Vincent questioned him about where management had "gone wrong" (R. 27; Tr. 194, 571). Walker reminded Vincent that he had been away in the Armed Forces, and could not speak for the other men. Vincent told Walker that he could not believe Walker would have voted for the Union, that in view of Walker's expressed desire for a management position he regarded Walker's conduct

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[6] The Trial Examiner substituted this word as a "euphemism for the actual expression" used (R. 26, n. 19).

in voting for the Union as "very foolish" (R. 27; Tr. 194-195). Vincent informed Walker that his chances for advancement to a management position were "washed up" (R. 27; Tr. 194-195).

Vincent further told Walker that he felt that the stage crew had decided to "go union" quite a while ago, and that they had asked Wetherill to organize them. He said that after they had gotten into it some of them would have liked to back out, but they did not want to let Wetherill down (R. 27; Tr. 195). Vincent said, "It is still not too late as negotiations will start in a few days" *(ibid.)*. He suggested that the stagehands come to him "en masse," or that they send a group including people such as Bruce Lovelady to iron out their differences. He said the men would in effect be forming their own union and would not have to go through the Union *(ibid.)*.

Vincent told Walker that Barkow and Lein could be taken care of if something had to be done about them and reiterated that the employees could form their own group and come to him to iron out their differences (R. 27; Tr. 195-196). He said that "Harrah's wants nothing to do with the Union" and that the I.A.T.S.E. "wants Harrah's so bad they can taste it" *(ibid.)*. In response to Walker's question as to whether some of the employees were union members, Vincent replied that Harrah's "had no union" and that "Harrah's prefers to bargain directly with the employees" (R. 27; Tr. 196). Vincent requested Walker to notify the other members of the crew to come in. Walker agreed to do so, and left (R. 27; Tr. 196-197).

On October 17, Casino Shift Manager Joseph Sheeketski sent for one of his employees, Karla Murray, wife of one of the stage crew (R. 29; Tr. 247-248). She was relieved at her card table and met Sheeketski at 7:30 p.m. at the rear of the building as instructed (R. 29; Tr. 248). He asked whether she would mind having a "chat" with him, she consented, and he ushered her to the office of Assistant Club Manager Clever on the second floor of the Club. On the way to the office she asked him whether the chat concerned her work and he replied it did not (R. 29; Tr. 249).

When they arrived at Clever's office Sheeketski asked her whether she knew that 12 men had voted for the Union in the election. Mrs. Murray corrected him, saying she understood the number was 11. Sheeketski accepted the correction and said, "You know the Union made promises that in case the men didn't have work there would be work in Las Vegas for them. You know there is a possibility of cutting down on the men back stage. You know how hard it is to move a family" (R. 29; Tr. 249). He asked her if she were familiar with working conditions for women in Las Vegas. He told her that according to his information casinos in Las Vegas did not employ lady dealers and that in view of his information about the promises Wetherill had made to the stagehands, it would be very doubtful that she could obtain employment there as a dealer if her husband transferred to Las Vegas (R. 30; Tr. 822-823). He asked if she liked working at the Club, and she responded that she did. Sheeketski continued, "You know about the promises made and you also know that your husband

could possibly be one of the men to go since he is lower in seniority" (R. 29; Tr. 249). Mrs. Murray protested that she considered that a threat. Sheeketski persisted in asking her where the men held their meetings, and she replied, "You have 11 men back stage. Why don't you ask them." He observed, "This conversation isn't getting anywhere, is it?" Murray agreed, repeating her suggestion that Sheeketski question the men, then excused herself and left (R. 29; Tr. 249-251).

On October 20, Lovelady approached Lein about a rumor that stagehands would no longer be permitted to work in the Entertainment Lounge. Lein confirmed the rumor. Lovelady asked, "As of when?" Lein replied, "As of the election" (R. 28; Tr. 108). When Lovelady asked the reason behind the change, Lein replied, "because Mr. Andreotti doesn't want the Lounge to come under the contract" (R. 28; Tr. 108). Lovelady exclaimed, "Do you mean to tell me after three or four years of working in the Lounge and the Lounge belonging to us it no longer belongs to us?" Lein said, "This is true, and many other things no longer belong to you" (R. 28; Tr. 109). He explained, "For instance there is more than $200.00 paid in annual holidays in a year that you will no longer get. . . . These type of privileges you won't get" *(ibid.)*. Lovelady protested that those matters were negotiable, and Lein remarked, "You are right. They are negotiable, however, these are Mr. Harrah's benefits and if Mr. Harrah doesn't wish to give them to you you won't get them." Lovelady persisted that they

were negotiable items and Lein said, "That's true, but I will bet you won't get them" *(ibid.)*.

Late in October, Lein told Lovelady that he was "really worried about you guys" (R. 28; Tr. 113). Asked why, Lein replied that "I don't think it's going to work . . . I don't think the men are going to be able to cut it. I don't think they will be able to pass the test. I don't think they will be able to get in the Union, and I think you guys will end up hanging out on a limb" (R. 28-29; Tr. 113). He said he felt it was the wrong time for the stagehands to organize, and added, "If we have a show that only needs two men or only needs three men, it won't be like in the past where you all stayed on working. That is all we will use and the rest of you will be out of work. Since there are no other union establishments around, where are you going to work?" (R. 29; Tr. 113).

D. *The discharge of Wetherill*

Wetherill was hired on August 30, 1962, as sound console operator [7] in the South Shore Room. He continued in that job until he became sick in early May 1963. On his return, about May 30, he was transferred, at his request, to a job in the stage crew (R.

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[7] The sound console, located above the stage in the South Shore Room, is the mechanism used to regulate sound amplification for the performances there (Tr. 231, 244, 618). The sound console operator places the microphones at appropriate places on the stage prior to the show, and then operates the console during the performance (Tr. 232, 233). An intercom system is used to allow the producer and stage manager to direct and instruct the operations of the sound console during the performances themselves (Tr. 619-620, 622).

37; Tr. 11-12, 45). He worked for a week or 10 days on the AC lighting board, under the supervision of Lighting Director Vogt, and then was assigned to the "deck" or stage (R. 37; Tr. 46-47).

In early June 1963, Wetherill became unsalaried business agent for the Union (R. 37; Tr. 10, 14). He notified Brigham of this position about a week later, and management officials Vincent, Barkow, Lein, and Vogt learned soon afterward (R. 37; Tr. 14, 389, 554, 705, 616, 641). Vogt asked Wetherill what he was going to do as business agent, and Wetherill told him he had no plans as yet (R. 37; Tr. 17, 642).

During the summer, Charles Walker, a former stagehand who had been drafted into the Armed Forces, wrote Barkow requesting a job when his tour of duty ended (Tr. 171-172). Barkow wrote back, saying that Walker was returning at an opportune time, and should contact him at Walker's convenience (Tr. 173-175). In August, after his discharge from the service, Walker met with Barkow in Stateline. They agreed that he would report for work on September 4 (R. 46; Tr. 177-178). During this conversation Barkow told Walker that a new Wage and Hour law might affect the crew and cause more help to be put on (Tr. 184).

During this time, employee Paul Jordan heard of Walker's imminent return and approached Lein about solidifying his position before Walker returned because he "would be the logical one to be bumped" (R. 42; Tr. 266). Lein promised "to see to it or at least to attempt to make me a stage technician" (R. 42; Tr. 266-267). Jordan had been hired in the fall

of 1960, and had worked in the food department until November 1962, when he became an apprentice stage technician (R. 41; Tr. 263, 275). In the first week of January 1963, Lein instructed Jordan to sign his time slips thereafter as a stage technician in the Entertainment Department (R. 41-42; Tr. 264, 274) although he was still carried on the books in the Personnel Department as on loan from the Food Stores Department (R. 42; Tr. 264, 92).

About August 2, Producer Barkow informed employee Ray McNerthney that he was to be replaced by a returning veteran and that he should start looking for another job, although he would assure him another month's employment (R. 43; Tr. 217-218). Barkow said that McNerthney was selected because he "was the low man on the seniority list on the stage at that time" (Tr. 239). McNerthney had been hired on May 14, 1962, and worked as a sound maintenance man for a week. He had then been assigned to the sound console, which he operated until Wetherill was hired for that job in August 1962 (R. 42; Tr. 210-211). At that time McNerthney had returned to the job of sound maintenance man, in the Maintenance Department, until Wetherill became ill in May 1963 (R. 42; Tr. 211). He then started splitting his time, working 3 days a week doing sound maintenance in the Casino and 2 days a week relieving Swartz on the sound console *(ibid.)*. In June 1963, Austin Raymer, the Maintenance Director, complained that his department was being charged with McNerthney's entire salary although he was working only 3 days for

it. After a discussion about this, Lein and Swartz instructed McNerthney to sign his time slips as an employee of the Entertainment Department and informed him that he would thereafter be assigned exclusively to the South Shore Room (R. 42; Tr. 212-213). Since then McNerthney has been employed there, operating the sound console on Swartz' days off, and maintaining the sound equipment the remainder of the time (R. 42; Tr. 213, 223-224, 233).

About a week later, Vogt told McNerthney that he would not lose his job, that there had been a meeting with Lein, Barkow, Vogt, and Swartz, and they had decided to assign him to the Lighting Department because of his electrical background. Vogt said McNerthney would assist in maintaining the light equipment and would act as a relief spotlight operator (R. 43; Tr. 218). Vogt also informed him that another man, Norman Julian, would be hired to relieve Swartz on the sound console and to do some work in the Lighting Department, and that McNerthney would transfer at that time (R. 43; Tr. 218-220, 653, 668).

Also early in August, Barkow and Lovelady discussed the possible effect of the new Wage and Hour Law on the stagehands. Barkow told Lovelady that it appeared that respondent would either have to schedule a 7-hour day, 6-day workweek, or hire two new men in addition to Walker, so as to avoid the payment of overtime (R. 47; Tr. 79-80). Barkow added that Lein and Vogt had been urging him to hire additional men because, as things were, Vogt had

been obliged to do relief work at the spotlight and light board, and Lein had been complaining that he had been unable to give his men vacations and time off. The employment of the two additional men would relieve that problem (R. 47; Tr. 80-81).

Shortly thereafter, on August 9, Wetherill sent the telegram to respondent requesting recognition, and on August 14, filed a representation petition with the Board (R. 16; Tr. 19-22).

In the latter part of August, McNerthney asked Vogt when Julian was coming to work. Vogt told him that he did not know, that management did not know what to pay him, and that "they would make no changes until the union situation was clarified" (R. 43; Tr. 221-222).

On August 30, Barkow telephoned Walker at his home and said that he needed him at work immediately, and asked him to report for work on September 1. Barkow apologized for cutting his vacation short. Walker asked if something had happened, or "if somebody had broken a leg" (R. 46; Tr. 178). Barkow admonished him to keep his "mouth shut" and they would talk later (*ibid.*). Walker arrived at the Club on August 31 and started work the following day (Tr. 170-171).

On September 1, Barkow called Wetherill into his office and told him that he was being terminated as of the end of the show that night (R. 38; Tr. 27-29). Barkow showed him a termination slip which read, "To make room for a man coming out of the service" (R. 38; Tr. 29). Wetherill asked, "and because

I was the youngest man I was the first to go? . . . What about Paul Jordan?" Barkow replied, "Oh, he's just an apprentice." Wetherill asked whether he was being terminated because of the Union, and Barkow replied "No" (*ibid.*).

The day after Wetherill's termination, Lein told Jordan that he "was a lucky son-of-a-bitch because they ruled that Wetherill was the junior man" and Jordan was kept on (R. 42; Tr. 267-268).

Wetherill filed a protest against his discharge to the Board of Review. A meeting was scheduled for September 13, but due to an apparent lack of communication Wetherill did not appear [8] (R. 38-39; Tr. 320, 349, 787). On September 15, the Board of Review convened again. Brigham and Clever represented management, and Lovelady was the employee representative (R. 39; Tr. 31, 32, 89). Brigham asked Wetherill why he had requested the meeting. Wetherill replied that he felt his discharge was "unfair" because there were others on the stage crew who had less seniority than he. Brigham countered by asking him whether he thought they had been "unfair" when they hired him in spite of his criminal

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[8] At this meeting, while the Board of Review members were awaiting Wetherill's arrival, Brigham examined Wetherill's personnel jacket and asked the others if they were aware that Wetherill had been convicted of a crime (R. 39; Tr. 348). Wetherill testified on direct examination, that he had been convicted, after a plea of guilty, of violation of Federal statutes prohibiting the sending of obscene material through the mail. He received a suspended sentence of 1 year and was placed on probation. (R. 39; Tr. 41). The Trial Examiner noted this conviction in assessing Wetherill's credibility (R. 39, n. 41).

record, and paid him during his illness (R. 40; Tr. 35-36).

Wetherill and Lovelady contended that both Jordan and McNerthney had less seniority than Wetherill. Wetherill contended that he had been in the Entertainment Department since he was originally hired in August 1962, to run the sound console (R. 40; Tr. 360, 37), thus giving him more seniority than Jordan or McNerthney. Clever said that the sound console was in the Sound Department rather than the Entertainment Department, and that Wetherill did not come to work in the Entertainment Department until May 1963. He further argued that Jordan became a member of the stage crew in November 1962, and that McNerthney had never been on the stage crew, but rather, was in the Sound Department (R. 39-40; Tr. 90). Clever denied Lovelady's contention that the Sound Department had actually been abolished (R. 39; Tr. 90-91). Brigham further announced that Jordan was still assigned to the food stores department, and had only been on loan to the stage or Entertainment Department for the past 10 months (R. 40; Tr. 92). Lovelady then said that if Jordan were not permanently assigned to the stage, he should have been the one terminated rather than Wetherill (R. 40; Tr. 92).

Wetherill was excused after extended argument, and the Board of Review voted 2 to 1 to uphold the discharge (R. 40; Tr. 94). Clever said that he was governed by the records, and that Wetherill was the last stagehand hired, but that Wetherill should have been

laid off rather than terminated (R. 40; Tr. 93, 94). Wetherill was summoned and notified of the decision. Brigham consoled him with the reminder that since he had filed charges with the Board, he would have a further opportunity to present his case (R. 40; Tr. 361-362).

II. The Board's conclusions and order

Upon the foregoing facts, the Board, in agreement with the Trial Examiner, concluded that respondent is engaged in commerce within the meaning of the Act (R. 48). The Board also concluded that respondent had violated Section 8(a)(1) of the Act by coercively interrogating employees regarding their union activities, by threatening them with reprisals because of such activities, and by soliciting employees to abandon the Union as their collective bargaining representative and deal instead directly with management (R. 48). The Board further concluded that respondent violated Section 8(a)(3) and (1) of the Act by discharging employee Robert Wetherill because of his union activities.

The Board's order requires respondent to cease and desist from the unfair labor practices found and from in any other manner interfering with, restraining or coercing its employees in the exercise of their protected rights (R. 48-49). Affirmatively, the Board's order requires respondent to offer full and immediate reinstatement to Wetherill in his former or a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and to make him whole for any loss of earnings he may have

suffered by reason of respondent's discriminatory conduct; and to post the appropriate notices (R. 49-50).

SUMMARY OF ARGUMENT

I. Respondent stipulated at the unfair labor practice proceeding that during the preceding fiscal year it had purchased and received materials in excess of $50,000 directly from outside the state, and that during the same period it had sold goods and services at retail in excess of $500,000 valuation, thereby clearly evidencing the Board's statutory jurisdiction over its operations. Whether or not the Board should exercise such jurisdiction is a matter which ordinarily lies within its discretion. Respondent has not shown here that the Board's assertion of jurisdiction over its operations was an abuse of such discretion.

II. The Board properly concluded from the evidence that respondent violated Section 8(a)(1) of the Act. After learning that the Union had filed a petition for a representation election, the Company engaged in an extensive preelection campaign calculated to dissuade the employees from seeking union representation. Company officials admonished the employee organizer for not informing them of the organizing efforts, and threatened that a union contract would cause a reduction in the work force. These officials interrogated other employees and threatened that the Union's advent would mean "less job security" and a "cut back" of the work force. After the Union won the election by a unanimous vote, a management of-

ficial angrily threatened to "get even" with the employees and that the crew would be reduced 30 to 50 percent. Several employees were interrogated and some were informed that reprisals would be effected because of the way they voted in the election. Thereafter, shortly before contract negotiations were to begin, respondent's officials solicited the employees to back out of the Union and deal directly with management. Respondent's numerous contentions that these activities were privileged are not meritorious.

III. Substantial evidence supports the Board's finding that respondent violated Section 8(a)(3) and (1) of the Act by discharging employee Robert Wetherill because of his activities in organizing respondent's employees, and that respondent's avowed reason for the discharge was a pretext to cover the real reason. Wetherill became unpaid Business Agent of the Union early in June 1963, a fact which he immediately disclosed to respondent. He organized the unit employees and in mid-August personally signed both the telegram requesting bargaining and the petition for a representation election. These activities brought intense personal resentment upon Wetherill from respondent's officials, who, claiming he had "stabbed them in the back," announced they would "never forget and forgive" him for doing "this thing to us".

Immediately prior to learning of the Union organizational campaign, respondent announced it was increasing the size of the crew by one man and that it was contemplating adding several more. In addition, respondent had already agreed to take on a

former employee, Charles Walker, who was returning from the service. But within a few days, respondent learned of the organizing campaign and Wetherill's role therein. Within three weeks thereafter, respondant had declined to hire the new man and had discharged Wetherill when Walker reported to work. Moreover, respondent had urgently phoned Walker and accelerated his reporting date although there was much work to be done on a difficult stage set on which Wetherill was working, and Walker admittedly needed a period of reorientation. Respondent did not explain its abrupt decision that it could not, after all, increase the size of the crew. But a statement by a supervisor that the new man was not hired because management "would make no changes until the union situation was clarified," indicates that it was the advent of the Union which caused the reversal of plans. Respondent's discriminatory motivation was further evidenced by its promises to several employees that it would discharge certain supervisors if necessary to stop the Union, and also by the fact that it made no effort to transfer or layoff Wetherill despite a supervisor's acknowledgement that he should have been laid off, rather than discharged.

Respondent alleged that it discharged Wetherill solely because he was the junior man in the department and it had to discharge someone in order to make room for Walker. The Board found that Wetherill was not the junior man in the department, but that even if he was, the evidence indicated the asserted reason for the discharge was a pretext and

that the true motivation for the discharge was reprisal for Wetherill's union activities.

ARGUMENT

I. The Board Properly Asserted Jurisdiction Over Respondent's Operations

Before the Board, respondent argued that it operated essentially as a gambling casino and that the Board should apply its prior decisions in the race track cases and decline to assert juridiction over its operations. The Board rejected this argument and, as we show below, properly asserted jurisdiction over respondent's operations.

Respondent did not contest the Board's statutory jurisdiction [9] over it. Respondent stipulated at the unfair labor practice hearing that during the preceding fiscal year it had purchased and received materials valued in excess of $50,000 directly from points and places outside Nevada, and that during the same period it had sold goods and services at retail in excess of $500,000 valuation (R. 14; Tr. 321-322, 5-6). There can be no question, therefore, that the Board has statutory jurisdiction over the business activities of respondent. *N.L.R.B.* v. *Reliance Fuel Corp.*, 371 U.S. 224; *Polish National Alliance* v. *N.L.R.B.*, 322 U.S. 643, 647-648; *N.L.R.B.* v. *Fainblatt*, 306 U.S. 601, 604-607; *N.L.R.B.* v. *Stoller*,

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[9] The Act specifically states that the statutory jurisdiction of the Board extends to any person ". . . engaging in any unfair labor practice . . . affecting commerce." Section 10(a), 29 U.S.C. § 160(a), as those terms are defined by Section 2 (6) and (7) of the Act, 29 U.S.C. Section 152(6) and (7).

207 F. 2d 305, 307 (C.A. 9), cert. denied, 347 U.S. 919; *N.L.R.B.* v. *Aurora City Lines, Inc.*, 299 F. 2d 229 (C.A. 7).

Since the Board possesses statutory jurisdiction over respondent, "the extent to which that jurisdiction will be exercised is a matter of administrative policy within the discretion of the Board." *Lucas County Farm Bureau Cooperative Association* v. *N.L.R.B.*, 289 F. 2d 844, 845-846 (C.A. 6), cert. denied, 368 U.S. 823. Accord: *N.L.R.B.* v. *W.B. Jones Lumber Co.*, 245 F. 2d 388, 391 (C.A. 9); *N.L.R.B.* v. *Stoller*, *supra*, 207 F. 2d at 307 (C.A. 9); *N.L.R.B.* v. *Townsend*, 185 F. 2d 378, 383 (C.A. 9), cert. denied, 341 U.S. 909. The gravamen of respondent's argument appears to be that the Board abused its discretion by asserting jurisdiction over gambling casinos after having declined, pursuant to Section 14(c)(1) of the Act,[10] to assert jurisdiction in similar cases involving the horseracing industry.[11] Respondent contends that the Board's rationale in the racetrack cases—(1) racetrack operations are essentially

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[10] Section 14(c)(1) provides, in relevant part, "The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction . . ."

[11] See, e.g., *Walter A. Kelley et al.*, 139 NLRB 744; *Meadow Stud, Inc.*, 130 NLRB 1202; *William H. Dixon*, 130 NLRB 1204; *Hialeah Race Course*, 125 NLRB 388; *Jefferson Downs, Inc.*, 125 NLRB 386; *Los Angeles Turf Club, Inc.*, 90 NLRB 20.

local in character, and (2) are subject to detailed state regulation—is particularly applicable to gambling casino operations. The Board was faced with the same argument in *El Dorado, Inc.*, 151 NLRB No. 82, 58 LRRM 1455, where it ruled that the racetrack cases did not require it to forsake jurisdiction over gambling casinos (58 LRRM at 1456). The Board found that a labor dispute in Nevada's gambling industry, contrary to the horseracing industry, could substantially disrupt commerce (58 LRRM at 1456-1457).

The argument that the gambling industry is "essentially local in character" so as to preclude the Board's assertion of jurisdiction is unconvincing. Gambling, coupled with tourism, is Nevada's primary industry. It supplied $13.7 million, or 28 percent, of the tax revenues paid into the State's "general fund" in fiscal 1964.[12] The gambling industry provides income for 116,000 or 75 percent, of the 155,000 people engaged in non-agricultural employment in Nevada; it is estimated by the State of Nevada that 39,000 of these are employed directly by the gambling industry.[13] The industry is instrumental in attracting more than 20 million tourists to the State annually, facilitating vast use of interstate public and private transportation.[14] According to the State Gam-

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[12] *El Dorado, Inc.*, 151 NLRB No. 82, 58 LRRM 1455.

[13] *Legalized Gambling in Nevada*, revised edition, State of Nevada publication, 1963, p. 52.

[14] In *Marshall* v. *Sawyer*, 301 F. 2d 639, 649 n. 3 (C.A. 9), this Court noted that:

"The extent of the facilities provided to carry trade to

ing Control Board the overall impact of the gambling industry affects 60 percent of the State's economy. *El Dorado Club*, *supra*, 58 LRRM 1455. Accordingly, it is plain that a labor dispute in an industry which directly employs a large number of employees in the dominant industry in the State, and which is dependent upon substantial and closely related interstate activity, transcends merely local importance and does substantially affect commerce. *Id.* at 1456. Cf. *United States* v. *Shubert*, 348 U.S. 222, 226-227; *United States* v. *International Boxing Club*, 348 U.S. 236, 241; *N.L.R.B.* v. *Reed*, 206 F. 2d 184, 186 (C.A. 9).

Likewise, the mere fact that Nevada has enacted detailed regulations safeguarding the gambling industry does not prevent the Board from asserting

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the Nevada gambling is almost beyond belief. Every day 88 scheduled airplane flights from other states reach Las Vegas. (This does not include chartered and other non-scheduled flights such as Hacienda's.) Forty-eight daily scheduled plane flights reach Reno. There are as many scheduled flights from Phoenix to Las Vegas as there are from Phoenix to Los Angeles. A few of these flights are subsidized by the gambling industry. See Las Vegas Hacienda, Inc. v. Civil Aeronautics Board, 9 cir., (Jan. 16, 1962), 298 F. 2d 430. Hacienda flights are advertised as including "free round trip", "de luxe rooms", "two bottles of champagne", etc., in the yellow pages of the San Francisco telephone book. High speed highways carry automobile traffic from Phoenix, Los Angeles, San Francisco, Sacramento, and elsewhere."

The Court also noted that some gambling proprietors have chartered Greyhound busses which bring 20 loads of passengers per day, with an average load of 30.2 passengers per bus, from California cities.

its jurisdiction over the labor relations of the employers and employees in the industry. It is axiomatic that "where the enforcement of a state statute impairs, qualifies or in any respect subtracts from any of the rights guaranteed by the National Labor Relations Act, such provisions are ineffective to the extent of such conflict." *Hamilton* v. *N.L.R.B.*, 160 F. 2d 465, 471 (C.A. 6), cert. denied, 332 U.S. 762. Accord: *Hill* v. *Florida*, 325 U.S. 538, 542; *N.L.R.B.* v. *Dalton Telephone Co.*, 187 F. 2d 811, 812-813 (C.A. 5), cert. denied, 342 U.S. 824. Cf. *United States* v. *Frankfort Distilleries, Inc.*, 324 U.S. 293, 299; *Navajo Tribe* v. *N.L.R.B.*, 288 F. 2d 162, 164 (C.A.D.C.), cert. denied, 366 U.S. 928.[15] Moreover, the Nevada Gaming Act is not intended to govern employer-employee relationships. Rather, the underlying policy of the extensive regulation is to prevent "undesirable elements" from encroaching into the gambling industry. *El Dorado Club, supra*, 58 LRRM 1455. The Board has determined that the long history of collective bargaining in the gambling industry in Nevada shows that union representation of employees in the industry would in no way interfere with the State's ad-

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[15] Cf. *Leonard, et al.* v. *Kennedy, et al.*, 57 LRRM 2150 (D.C. S.D. Cal.), where a three-judge district court rejected the contention that the Board had no jurisdiction to direct representation elections among brewing industry employees in California because the 21st Amendment withdrew federal power to regulate labor relations of employers and employees in the liquor industry in situations affecting interstate commerce, and because California had preempted the field by its comprehensive legislation regulating the brewing industry.

ministration of the strict standards imposed.[16] *Id.*, at 1456. Furthermore, State officials have announced that the State of Nevada "fully supports the principle of collective bargaining for gaming casino employees." *El Dorado Club*, *supra*, 58 LRRM at 1456.

In sum, the Board has asserted its discretionary jurisdiction over the gambling industry because a labor dispute in that industry, which is the dominant industry in the State and is largely dependent upon substantial and closely related interstate activity, could disrupt commerce substantially. *El Dorado Club*, *supra*, 58 LRRM at 1456-1457. This determination can hardly be termed an abuse of its discretion merely because it differs from an earlier Board declination with respect to the horseracing industry—a different, though similar, "class or category" of employers whose effect on commerce has been found to be less substantial than the industry involved here.

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[16] In *El Dorado Club*, the Board said, "[F]or at least 15 years, Intervenor Culinary Workers has represented, *inter alia*, bartenders, waiters, cocktail waitresses, and more recently . . . casino change girls. Even the guards who are employed to police the gambling areas have the benefits of collective bargaining under the Act. All these employees are subject to the same 'security checks' as the gaming employees . . . It clearly appears that all parties have accomodated themselves successfully to the pattern of collective bargaining without any demonstrable effect on supervision of gambling activities." (58 LRRM at 1456.) For other cases where the Board has asserted jurisdiction over gambling casinos, see *Harrah's Club*, 143 NLRB 1356 enforcement denied on other grounds, 337 F. 2d 177 (C.A. 9); *Thunderbird Hotel*, 144 NLRB 84; *Landrum Mills Hotel Corporation, d/b/a Hotel LaConcha*, 144 NLRB 754.

See, *N.L.R.B.* v. *Gene Compton's*, 262 F. 2d 653 (C.A. 9).

For these reasons, we submit that the Board acted within its discretion in asserting jurisdiction over respondent's business operations.

II. Substantial Evidence on the Record as a Whole Supports the Board's Finding That Respondent Violated Section 8(a)(1) of the Act by Coercively Interrogating Employees Regarding Their Union Activities, by Threatening Them With Reprisals Because of Such Activities, and by Soliciting Them to Circumvent the Union and Deal Directly With Management

As soon as respondent learned that the Union had filed a petition for a representation election, respondent embarked on a vigorous campaign to defeat the employees' organizational efforts. This campaign was not limited to a lawful advocacy of respondent's position. Rather, respondent interrogated employees regarding union activities, threatened that reprisals would be effected for union activity, and misrepresented the impact a union contract would have on their jobs. After the Union won the election by a unanimous vote, respondent's officials continued their interrogation and threats in a vain attempt to induce the employees to abandon the Union and form their own committee. As we show below, these tactics plainly disclose a pattern of unlawful interference with the employees' organizational rights, and the Board properly held that respondent thereby violated Section 8(a)(1) of the Act.

Immediately after learning that Wetherill had filed the election petition, management officials admonished

him for not having informed them of the organizing efforts. Lighting Director Vogt warned him, "You will never keep 14 men working here if you go union or have a union contract" (R. 16; Tr. 27, 52). Shortly thereafter, Stage Manager Lein, after telling Lovelady that management thought he was on the "Union side" (R. 17; Tr. 86, 87), informed him that the stage technicians "would be crazy to vote for the Union," that they would have "less job security" than they presently enjoyed, and that the current employees "would probably not all be kept on" (R. 17; Tr. 74-76, 116). The same day, Producer Barkow warned employee Rux that "the crew will be cut back because of the union activity" and that "the crew does not have to be as big because of a union contract" (R. 18; Tr. 300). A few days later Lein remarked to Lovelady that "some of the men in the crew are going to have a pretty difficult time working if this union contract thing goes through" (R. 18; Tr. 109-110, 599). Lein asserted that as stage manager he would be in position to reject any stagehand dispatched from the union hall. When Lovelady replied that he could do so only with good cause, Lein retorted, "I can think of many things." Lein suggested that Lovelady give that some thought (R. 18; Tr. 109-111). These statements comprised bald threats of reprisal contingent solely upon the advent of the Union, and could have no other effect than to "impede and coerce the employees in their right of self-organization." *N.L.R.B.* v. *Nabors*, 196 F. 2d 272, 276 (C.A. 5), cert. denied, 344 U.S. 865. Accord: *N.L.R.B.* v. *Price Valley Lumber Co.*, 216 F. 2d 212,

215-216 (C.A. 9), cert. denied, 348 U.S. 943; *Daniel Construction Co.* v. *N.L.R.B.*, 341 F. 2d 805, 813 (C.A. 4); *Hendrix Mfg. Co.* v. *N.L.R.B.*, 321 F. 2d 100, 104-105 (C.A. 5); *N.L.R.B.* v. *Abrasive Salvage Co.*, 285 F. 2d 552, 554 (C.A. 7).

Immediately after the Union's election victory, Brigham remarked to a group of employees that he had "been made a fool of" and that he would "get even" with them; and pointing to another group of employees Brigham promised to "get them too" (R. 22; Tr. 192, 294-296). A few days later Brigham attempted to apologize for his earlier statements, but became angered when an employee declared he had threatened them on the earlier occasion. Brigham denied threatening them, and exclaimed, "If I did not then, I do it [now]. I am a vindictive man, and believe me, what I said still goes. Within six to eight months this crew will be reduced 30 to 50 percent" (R. 25; Tr. 96). Further, Vincent called Walker into his office and informed him that it was "very foolish" of him to vote for the Union and that his chances for a management position were "washed up" (R. 27; Tr. 194-195). Additionally, Lein informed Lovelady that "as of the election" the stage crew would no longer work in the Entertainment Lounge, and that the employees would no longer get their annual paid holidays and "these type privileges" (R. 28; Tr. 108-109). Lein further threatened that in the future the crew would be cut whenever a show required only a few men, and that it would not be like in the past when everyone stayed on (R. 29; Tr. 113). Such

threats of reprisal for the employees' union activities manifest a flagrant breach of the respondent's statutory duty. *N.L.R.B.* v. *Idaho Egg Producers*, 229 F. 2d 821 (C.A. 9); *N.L.R.B.* v. *Hazen*, 203 F. 2d 807 (C.A. 9); *Peter J. Schweitzer, Inc.* v. *N.L.R.B.*, 144 F. 2d 520, 522 (C.A.D.C.); *N.L.R.B.* v. *Lester Brothers, Inc.*, 301 F. 2d 62, 67 (C.A. 4); *N.L.R.B.* v. *Hill & Hill Truck Line*, 266 F. 2d 883, 885 (C.A. 5).

On several occasions, management officials interrogated employees about the Union. On September 13, Brigham asked Rux if he had been approached to join the Union, and further asked if he knew anything about unions (R. 20; Tr. 302). The same day Barkow detained Walker in his office and asked him if he had heard about "this union deal" and how he "felt about it" (R. 19; Tr. 185). Barkow also questioned Walker about any previous dealings he had had with unions, and asked Walker to explain his having been "on both sides of the fence" (*supra*, pp. 7-8). This Court has found such interrogation to be violative of the Act "because of its natural tendency to instill in the minds of employees fear of discrimination on the basis of the information the employer has obtained." *N.L.R.B.* v. *West Coast Casket Co., Inc.*, 205 F. 2d 902, 904 (C.A. 9). Accord: *Martin Sprocket & Gear Co.* v. *N.L.R.B.*, 329 F. 2d 417, 420 (C.A. 5); *Daniel Construction Co.* v. *N.L.R.B.*, 341 F. 2d 805, 812 (C.A. 4); *Edward Fields, Inc.* v. *N.L.R.B.*, 325 F. 2d 754, 758-759 (C.A. 2). Furthermore, respondent apparently "had no legitimate reason to ferret out" any information from the em-

ployees at the time (*Martin Sprocket & Gear Co.* v. *N.L.R.B.*, *supra*, 329 F. 2d at 420). Rather, its subsequent conduct makes clear that its reason for questioning the employees was to coerce them into voting against the Union. Thus, after questioning Rux, Brigham disparaged the Union and remarked that he considered any crew member who joined the Union to be a "weakling and afraid of his job with the possibility of being fired or he knew he needed the Union for a crutch to lean on" (R. 20; Tr. 302-305). Similarly, after questioning Walker about his reaction to the Union, Barkow suggested that Walker consult Brigham about his expressed desire to become a part of management. Barkow promised to inform Walker as to the opportune time to consult with Brigham (R. 19; Tr. 186). It seems apparent, however, in view of respondent's subsequent action, discussed *supra*, pp. 13-14, 36, in berating Walker for voting for the Union and informing him his chances for a management position were "washed up," that the suggestion was intended primarily as a means to coerce Walker into voting against the Union. Cf. *N.L.R.B.* v. *Power Equipment Co.*, 313 F. 2d 438, 440-441 (C.A. 6).

Likewise, after the election, Vincent called both Lovelady and Walker into his office and questioned them as to where management had gone wrong (R. 26, 27; Tr. 103, 563, 571). In both instances Vincent indicated that management would go to great lengths to get rid of the Union, even to the point of discharging Supervisors Barkow and Lein, and that Harrah's did not want any part of the Union (*supra*,

pp. 12, 14). In addition, a supervisor in the Casino, Joseph Sheeketski, sent for Karla Murray, one of his employees and the wife of one of the stage crewmen, and interrogated her as to where the men held their union meetings, threatened that her husband might be discharged, and cautioned that the whole family would suffer as a result (*supra*, pp. 15-16).[17] The Board properly found this further interrogation was coercive within the meaning of the Act. *N.L.R.B.* v. *Idaho Egg Producers, Inc.*, 229 F. 2d 821 (C.A. 9); *N.L.R.B.* v. *West Coast Casket Co., Inc.*, 205 F. 2d 902, 904 (C.A. 9); *Daniel Construction Co.* v. *N.L.R.B.*, 341 F. 2d 805, 812 (C.A. 4).

Respondent's contention that the post-election interrogations of Walker, Lovelady and Karla Murray were protected as a necessary means of preparing its objections to the election is without merit. It is clear that the Act permits for purposes of trial preparation

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[17] It is significant that Sheeketski testified that he had told Brigham, during their discussion regarding the possibility of his getting information from Mrs. Murray, that "you know that if I talk to Karla that sometime during my conversation she is going to accuse me of threatening her or imposing on her" (R. 31; Tr. 838). Yet they went ahead with the questioning.

According to Brigham, Mrs. Murray was interviewed because he believed that her husband had been greatly intimidated by his fellow crew members, and that no good would come to Murray if respondent approached him directly (R. 31-32; Tr. 852-853, 859). The Board found, however, that Brigham approached Mrs. Murray because he felt her husband would be susceptible to respondent's persuasion, and that the coincidence of Mrs. Murray working in the Casino afforded respondent the means of conveying the message to him without approaching him directly (R. 32).

"any legally proper evidential interrogation . . . *within the issues of the case* and wholly for the purposes thereof." *Katz Drug Co.* v. *N.L.R.B.*, 207 F. 2d 168, 172 (C.A. 8). Accordingly, interrogation unrelated to the issue in litigation and any accompanying threats of reprisal cannot be so protected, particularly "where there is purposeful intimidation of employees." *Joy Silk Mills, Inc.* v. *N.L.R.B.*, 185 F. 2d 732, 743 (C.A.D.C.), cert. denied, 341 U.S. 914; *N.L.R.B.* v. *Guild Industries Mfg. Corp.*, 321 F. 2d 108, 113-114 (C.A. 5). Here, although a fundamental purpose in respondent's questioning the employees could well have been to gather information incident to preparing its objections to the election, it is apparent from the discussion above that it did not confine itself to this purpose. Thus, its questions to the employees as to "where management went wrong" and "where the men held their meetings" would yield little in the way of proof of unfair Union preelection conduct, but on the other hand, such interrogation coupled with threats and antiunion expressions would reasonably tend to interfere with the free exercise of employee rights under the Act. *Joy Silk Mills, Inc.* v. *N.L.R.B.*, *supra*, 185 F. 2d at 743-744; *N.L.R.B.* v. *Guild Industries*, *supra*, 321 F. 2d at 113-114. "The fact that the fruits of the questioning are to be used in preparation for a hearing does not make the interrogation any less coercive." *Joy Silk Mills, Inc.* v. *N.L.R.B.*, *supra*, 185 F. 2d at 743. Accordingly, as the Board found, respondent's interrogation exceeded the necessities of preparing its case, and therefore was not protected (R. 36, 37).

Finally, other remarks, too, were found violative by the Board, consistent with settled law. Thus, after Vincent had questioned Walker about where management had gone wrong, he informed Walker that some of the employees wanted to "back out" of the Union, and that it was "not too late as negotiations will start in a few days" (R. 27; Tr. 195). He suggested that the employees form their own group and come to him to iron out their differences so that they would, in effect, be forming their own union without going through Wetherill (R. 27; Tr. 196). Vincent reiterated that Harrah's wanted nothing to do with the Union and preferred to "bargain directly with the employees" (*ibid.*). It is clear that an employer interferes with his employees' right to self organization when, as here, he solicits them to bypass their selected bargaining representative and deal directly with him. *N.L.R.B.* v. *Quaker Alloy Casting Co.*, 320 F. 2d 260, 261 (C.A. 3); *N.L.R.B.* v. *Atlantic Stages*, 180 F. 2d 727, 729 (C.A. 5).

On numerous occasions, respondent's supervisors informed the employees that membership in the Union might be foreclosed to them, and that they would then be out of work. Brigham and Barkow told several employees that the Union required stagehands to pass extensive tests in order to qualify for membership; and Brigham told Rux and Lovelady that the stage crew might not pass the tests (R. 20; Tr. 303), and further, that he did not believe they would be able to pass (R. 17; Tr. 84-85). Barkow said that even if the Local accepted them, it was doubtful that

the International would admit them to membership, and that "they can always put a question in that even the best prepared man would fail" (R. 17, 19; Tr. 85, 185-186). Brigham told Rux that the Union was a father and son organization, and that a stagehand could not join unless his father was a member (R. 20; Tr. 303). Lein warned Lovelady that he felt the men would not pass the test and would not get into the Union, and would "end up hanging out on a limb." Lein also told Lovelady that respondent would use only the necessary men for a particular show and the rest would be out of work (R. 18-19; Tr. 113).

Respondent assertedly obtained its information from a contract between another local of the Union and several Las Vegas resort hotels, and also from discussions several years earlier with representatives of another local (R. 34). There is no indication in the Las Vegas contract, however, or in any other evidence offered, that the Union required extensive tests before admitting stagehands to membership, or that the employer would be required to reduce the crew, or that the Union membership was limited to members and their sons (R. 34-35; RX 6). Furthermore, the contract explicitly provides that the hiring hall referrals shall be on a non-discriminatory basis, and "shall not be in any way affected by Union membership, by-laws, rules, regulations, constitutional provisions, or any other aspect or obligation of Union membership, policies, or requirements" (R. 34; RX 6).

Accordingly, the Board properly found that respondent's misrepresentations coerced the employees

in the exercise of their right to self-organization. These "predictions" carried the threat of a loss of future employment if the Union should come in; in the absence of a showing of "some reasonable basis," they are not protected by Section 8(c) of the Act. *International Union of Electrical Workers* v. *N.L.R.B.*, 289 F. 2d 757, 762-763 (C.A.D.C.). Moreover, the absence of any factual justification for the statements casts doubt upon the motive for making them, and it is settled that a lack of good faith in making such a statement supports the conclusion that it was a "threat disguised as a prediction." *N.L.R.B.* v. *Harold Miller*, 341 F. 2d 870, 872-873 (C.A. 2). Even if membership in the Union were foreclosed to the employees, the evidence indicates that they could still be employed under the Union's non-discriminatory hiring hall arrangements, rather than be "out of work" or "hanging out on a limb" as respondent indicated. It is clear, therefore, under any circumstances, that respondent was not justified "in making the anticipated events the subjects of threats and allurements to force abandonment of the Union by the employees." *N.L.R.B.* v. *Parma Water Lifter Co.*, 211 F. 2d 258, 262 (C.A. 9), cert. denied, 348 U.S. 829.[18]

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[18] It is well settled that the "function of drawing the rather nebulous line between permissible persuasion and prohibited coercive conduct lies within the special competence of the Board, which, as we know, is primarily responsible for the effectuation of the purposes of the Act." *N.L.R.B.* v. *Brown-Dunkin Co.*, 287 F. 2d 17, 18 (C.A. 10). Accord: *Daniel Construction Co.* v. *N.L.R.B.*, 341 F. 2d 805, 811 (C.A. 4); *Surprenant Mfg. Co.* v. *N.L.R.B.*, 341 F. 2d 756, 760 (C.A. 6); *N.L.R.B.* v. *Stanton Enterprises, Inc.*, F. 2d (C.A. 4), 60 LRRM 2212, 2214.

For these reasons, the Board concluded that respondent's deliberate course of conduct interferred with, restrained and coerced its employees in the exercise of their rights guaranteed by Section 7 of the Act, and thereby violated Section 8(a)(1) of the Act. We submit, as shown above, that there is substantial evidence on the record as a whole to support the Board's conclusions. *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 488; *Bon Hennings Logging Co.* v. *N.L.R.B.*, 308 F. 2d 548, 553 (C.A. 9); *N.L.R.B.* v. *Mrak Coal Co.*, 322 F. 2d 311, 314 (C.A. 9).[19]

III. Substantial Evidence on the Record as a Whole Supports the Board's Finding That Respondent Violated Section 8(a)(3) and (1) of the Act by Discharging Employee Robert Wetherill Because of His Union Activities

Respondent admittedly discharged employee Robert Wetherill, the unsalaried business agent of the Un-

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[19] Some of the supervisors named above, called to testify at the Board hearing, denied that they engaged in some of the conduct attributed to them. But the Trial Examiner carefully resolved these testimonial conflicts with reference not only to the content of each witness' testimony but also their respective demeanor upon the witness stand (R. 17-33), and the Board affirmed (R. 57). The law is settled that such findings are matters for the Examiner and the Board. Absent extraordinary circumstances, therefore—and there are none here—this Court will not reevaluate the testimonial conflicts. *N.L.R.B.* v. *Local 776 I.A.T.S.E.*, 303 F. 2d 513, 518 (C.A. 9), cert. denied, 371 U.S. 826; *N.L.R.B.* v. *Stanislaus Equipment Co.*, 266 F. 2d 377, 381 (C.A. 9); *N.L.R.B.* v. *Radcliffe*, 211 F. 2d 309, 315 (C.A. 9), cert. denied, 348 U.S. 833; *N.L.R.B.* v. *Dant & Russell*, 207 F. 2d 165, 167 (C.A. 9); *N.L.R.B.* v. *San Diego Gas & Electric Co.*, 205 F. 2d 471, 475 (C.A. 9).

ion, about 2 weeks after he had demanded recognition of the Union as the majority representative among respondent's stage crew and had filed a petition for representation with the Board. According to respondent, Wetherill was discharged in order to make room for a veteran returning from service; but the Board found the asserted reason was a pretext, and that respondent, in reality, discharged Wetherill because of his union activities.

The determinative question in such a case is the true motivation for the discharge. The applicable principles for such a determination are familiar:

> The question as to the real reason for the discharge . . . was a question of fact to be decided by the National Labor Relations Board, which is empowered to consider circumstantial as well as direct evidence and where its finding is supported by circumstances, from which the conclusion may be legitimately drawn, the Court may not substitute its judgment for that of the Board.

N.L.R.B. v. *Lester Brothers, Inc.*, 337 F. 2d 706, 708 (C.A. 4).[20] We submit that the Board's finding here is sufficiently supported by the record to warrant enforcement pursuant to these principles.

First of all, Wetherill's role in bringing in the Union was made explicitly clear to respondent's officials

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[20] Accord: *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 488; *N.L.R.B.* v. *West Coast Casket Co., Inc.*, 205 F. 2d 902, 906-907 (C.A. 9); *N.L.R.B.* v. *San Diego Gas & Electric Co.*, 205 F. 2d 471, 475 (C.A. 9); *N.L.R.B.* v. *Howell Chevrolet Co.*, 204 F. 2d 79, 85 (C.A. 9), aff'd, 346 U.S. 482; *N.L.R.B.* v. *Mrak Coal Co., Inc.*, 322 F. 2d 311, 313, 314 (C.A. 9).

at the time. He informed respondent of his position as Union Business Agent as soon as he was elected to that position, and he personally signed both the demand for recognition and the petition for representation. These activities on behalf of the Union brought intense personal resentment upon Wetherill from respondent's officials. Thus, shortly before Wetherill's discharge, Supervisor Lein told another employee that "management . . . wouldn't trust Bob Wetherill anymore" because he had "stabbed them in the back" by filing the petition "after all we had done for him" (R. 16-17; Tr. 76-77); and Entertainment Director Vincent said he would "never forget and forgive" Wetherill for doing "this thing to us," referring to it as "the same thing as if I had invited him into my house and he [seduced] my wife" (R. 26; Tr. 106). Furthermore, respondent's overall conduct subsequent to the filing of the petition for representation reflects its strong hostility to the union movement. As already shown, management actively sought to discourage organization among its employees by starting a coercive counter-campaign of threats and interrogation in violation of Section 8(a)(1) which continued long after the Union won the election unanimously.

Moreover, the circumstances surrounding Wetherill's discharge indicate that the reason asserted by respondent was not the real cause. The record shows that immediately prior to respondent's learning of the Union campaign, it had announced that it was increasing the size of the crew by one man, and that it was contemplating taking on several more. Thus, in

early August, Supervisor Vogt informed employee McNerthney that a new employee, Norman Julian, would be hired to run the sound control and to do some lighting work, and that McNerthney would switch over to the lighting section at that time (R. 43; Tr. 218-219, 653). Earlier, respondent had written to Walker, the returning service man, that he was seeking reemployment at an opportune time; and when he reported in mid-August for his interviews, Producer Barkow informed him that a new Wage and Hour law might cause more help to be put on (Tr. 174-175, 184). Barkow also told Lovelady that the new Wage and Hour law might cause the hiring of three additional stagehands in order to avoid paying overtime (R. 47; Tr. 79-80). Barkow said that Supervisors Lein and Vogt had been urging him to hire additional men because Vogt had recently been forced to do considerable relief work and Lein had been unable to give his men the necessary time off and vacations. Lein had complained of this and had said the employment of two additional men would relieve the problem (R. 47; Tr. 80-81). It is apparent therefore that at this time respondent definitely planned to increase the crew by at least one employee, Julian, in addition to Walker. However, a few days thereafter, respondent learned of the Union campaign when it received the demand for recognition signed by Wetherill. Within 3 weeks of that demand, respondent discharged Wetherill, ostensibly because it had to make room for Walker.

Respondent does not explain what legitimate business considerations, if any, motivated its abrupt de-

cision that it could not after all increase the size of the crew. Certainly it was not information as to the applicability of the Wage and Hour law, because respondent officials admittedly did not discover that the crew would be unaffected by its provisions until more than a month after Wetherill's discharge (R. 47, n. 54; Tr. 544, 743). Rather, that it was the advent of the Union which caused the reversal of plans is obvious in light of Vogt's acknowledgement to McNerthney in late August that Julian had not been hired because management "would make no changes until the union situation was clarified" (R. 43; Tr. 221-222).

Also significant is respondent's hastening the return of Walker. Walker had earlier agreed to start work on September 4, but in late August, Barkow telephoned him and directed him to report to work on September 1. The urgency of the call prompted Walker to inquire whether "somebody had broken a leg." Barkow admonished him to "keep your mouth shut" and they would talk later (R. 46; Tr. 177-178). When Walker reported, Wetherill was working on a difficult stage set which called for an "unusual amount of manpower," and on which there was much more work to be done (R. 46; Tr. 608-611). Yet, on the day Walker arrived, Wetherill was discharged, even though Walker admittedly needed a period of reorientation (R. 46; Tr. 742).

On the basis of this evidence, the Board found that respondent seized upon the return of Walker as an excuse to justify the discharge of Wetherill, and thus to discourage the organization of its employees. That

respondent would be so motivated in order to defeat the Union's organizational attempt is plainly shown by Vincent's promises to Lovelady and Walker that management would discharge Barkow and Lein if necessary to stop the Union (*supra*, pp. 12, 14). Furthermore, it is clear that respondent discharged Wetherill without considering the possibilities of a transfer or a layoff. Supervisor Clever admitted that the Board of Review made no effort to determine whether Wetherill was qualified for other jobs with respondent, even though it was shown that another of respondent's departments had a transfer policy (Tr. 805). Clever also acknowledged at the Board of Review meeting that under the circumstances Wetherill should have been laid off, rather than discharged (R. 40, n. 44; Tr. 94). This would have been particularly apt since at the time of the discharge the new Wage and Hour provision was impending (*supra*, pp 47-48). Accordingly, these factors buttress the finding that respondent seized on the opportunity to get rid of Wetherill because of his union activities.

In addition, the Board found untenable respondent's contention that Wetherill had the least departmental seniority. In reaching this conclusion the Board determined that Wetherill had been in the Entertainment Department since he was originally hired as sound console operator in the South Shore Room on August 30, 1962 (R. 41, 44-45). Respondent, on the other hand, contends that the sound console operator is employed in the Sound Department, and that Wetherill did not come into the Entertainment Department

until May 30, 1963, when he assumed the duties of a stagehand (R. 39; Tr. 90). Respondent introduced evidence, including an organizational chart dated 1961, which showed that the sound console operator reported to the sound engineer (comprising the Sound Department) and was in the Construction and Maintenance Department; whereas, the stage and lighting technicians were shown to report to the South Shore Room Producer (Entertainment Department) and were in the Public Relations Department (R. 44; Tr. 519-523, RX 4). The record discloses, however, that shortly after Wetherill's employment as sound console operator, and considerably after the above-mentioned organizational charts were made, the Sound Department was abolished and the sound console was absorbed into the Entertainment Department. Thus, Stage Manager Lein told Wetherill about a month after he was hired that the sound console had been taken over by the Entertainment Department, and that he would be signing Wetherill's time slips from then on (R. 39; Tr. 60). Herb Swartz, the head sound engineer, verified this early in November 1962. He informed Wetherill that the sound console operator now belonged in the Entertainment Department, and that its supervisors would give him orders and sign his time slips (Tr. 922-924). Thereafter, Wetherill's time slips, indicating the job classification as "sound console operator" and the department as "stage" or "entertainment," were signed by Lein and Barkow, supervisors in the Entertainment Department (R. 43; n. 49; Tr. 932-934, CPX 3). Fur-

ther, Lovelady said that both Lein and Swartz had told him there was no longer a Sound Department, and that the sound console operator was under "Entertainment" (Tr. 124). When Lovelady mentioned at the Board of Review meeting that the Sound Department had been abolished for months, Clever denied it, but admitted that the position of sound engineer had been abolished (R. 39; Tr. 90, 91, 627-628). Swartz, formerly the sound engineer, told McNerthney that the position of sound engineer had been eliminated (Tr. 225). Even Supervisor Vogt testified that Swartz told him in October 1963 that there was no more Sound Department, but unexplainably Swartz told Vogt, 2 days prior to Vogt's testifying at the unfair labor practice hearing, that the Sound Department was not abolished (Tr. 695-696, 699-700).[21] Moreover, the record shows that the Entertainment Department exercised responsibility over the operation of the sound console (R. 44; Tr. 634-636, 750, 924-925, 619-622). And it was an Entertainment Department official, Barkow, who sent Wetherill to Las Vegas to observe a particular show and learn the sound console problems prior to its opening at Harrah's (Tr. 925-927).

Accordingly, the record supports the Board's finding that the job of sound console operator was actual-

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[21] Swartz was not called to refute the above statements attributed to him, although there was no indication he was unavailable (R. 46, n. 53). The Board validly inferred from this failure to call Swartz that his testimony would not have been favorable to respondent. *N.L.R.B.* v. *Radcliffe,* 211 F. 2d 309, 315 (C.A. 9), cert. denied, 348 U.S. 833; *N.L.R.B.* v. *Wallick & Schwalm Co.,* 198 F. 2d 477, 483 (C.A. 3).

ly in the Entertainment Department rather than in the Construction and Maintenance Department.[22] Consequently, Wetherill's seniority dated from his original hire on August 30, 1962, as sound console operator. He therefore was senior to Jordan, who had come into the Entertainment Department on November 27, 1962, as an apprentice or student stage technician and who was instructed by Lein to sign his time slips as a stage technician in the Entertainment Department in January 1963 (R. 41-42; Tr. 263-264, 274-275, 605).[23] Wetherill also was senior to Mc-

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[22] Respondent contended before the Board that this issue was not specifically decided by the Trial Examiner. It is apparent from the full context of his decision, however, that such was not the case. The Examiner concluded that "the record as a whole indicates . . . respondent did not maintain such a rigid separation between the two departments . . ."; that the "record supports a finding that the functions of the sound console operator . . . were more directly related to those of the stage crew than those of the Sound Department"; and that, "Thus, a tenable basis exists for concluding that the job of sound console operator was actually in the Entertainment Department . . ." (R. 44-45). Although the Examiner's phrasing lacks some definiteness, it is clear that he reached the issue at hand. At any rate, the Board found no merit in respondent's contention in this respect.

[23] Respondent's officials offered conflicting opinions of Jordan's status. When he was discharged, Wetherill asked whether or not Jordan was junior to him in departmental seniority, and Barkow replied that Jordan was only an apprentice (R. 38; Tr. 29). At the Board of Review meeting, Clever maintained that Jordan had become a member of the stage crew in November 1962 (R. 39; Tr. 90). Later at that same meeting, Brigham stated that Jordan was still assigned to the Food Stores Department, where he had earlier worked, and was merely on loan to the Entertainment Department for the

Nerthney, who preceded Wetherill on the sound console but was transferred to the Maintenance Department in the casino when Wetherill was hired (R. 42; Tr. 211). While in Maintenance, McNerthney worked in the casino 3 days a week and relieved Swartz on the sound console 2 days a week *(ibid.)*. Maintenance Director Austin Raymer complained about this arrangement because his department was being charged for all of McNerthney's salary while receiving only part-time service from him. As a result of this, McNerthney was instructed in June 1963 that he would thereafter work exclusively in the South Shore Room and that he would sign his time slips for the Entertainment Department (R. 42; Tr. 212-213). Since then McNerthney has worked exclusively in the South Shore Room, relieving Swartz on the sound console and maintaining the sound equipment (R. 42; Tr. 213, 223-224, 233).[24]

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10 months he had worked with the stage crew (R. 40; Tr. 92). Such inconsistencies strengthen the inferences drawn by the Board. See, *N.L.R.B.* v. *Dant & Russell*, 207 F. 2d 165, 167 (C.A. 9); *N.L.R.B.* v. *Radcliffe*, 211 F. 2d 309, 314 (C.A. 9), cert. denied, 348 U.S. 833.

[24] Respondent contends that McNerthney was never in the Entertainment Department but remained in the Sound Department (R. 43; Tr. 90). The record shows that McNerthney was instructed in June 1963 by Lein that he was now in the Entertainment Department, and that he should sign his time slips accordingly (*supra*, pp. 19-20). His time slips were thereafter signed by Vogt, Lein, or Barkow, all supervisors in the Entertainment Department (Tr. 241, GCX 4). Furthermore, a week before respondent learned of the Union campaign, Barkow informed McNerthney he would be discharged when Walker returned because he "was the low man on the

Accordingly, the record supports the Board's finding that Wetherill was not the junior man in the Entertainment Department and should not have been discharged under respondent's own contention. But without regard to this finding, the discharge of Wetherill, as we showed earlier, was motivated by anti-union considerations rather than a legitimate management concern to reduce the working force (*supra*, pp. 44-49). A finding that Wetherill was the junior man in the department, under these circumstances, would not enhance respondent's position. For it is settled law that:

> The mere existence of valid grounds for a discharge is no defense to a charge that the discharge was unlawful, unless the discharge was predicated solely on those grounds, and not by a desire to discourage union activity.[25]

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seniority list *on the stage* at that time" (R. 43; Tr. 217-218, 239). Shortly thereafter, respondent informed McNerthney that it had decided to transfer him over to the lighting section instead (R. 43; Tr. 218). Also, McNerthney voted for the Entertainment Department's Board of Review representative along with the remainder of the stage crew in October 1963 (R. 43; Tr. 891-892). The record clearly shows, therefore, that McNerthney came into the Entertainment Department in June 1963.

[25] *N.L.R.B.* v. *Symons Mfg. Co.*, 328 F. 2d 835, 837 (C.A. 7). Accord: *N.L.R.B.* v. *Texas Independent Oil Co.*, 232 F. 2d 447, 450 (C.A. 9); *William Motor Co.* v. *N.L.R.B.*, 128 F. 2d 960, 964 (C.A. 8); *N.L.R.B.* v. *West Side Carpet Cleaning Co.*, 329 F. 2d 758, 761 (C.A. 6); *N.L.R.B.* v. *Jamestown Sterling Corp.*, 211 F. 2d 725, 726 (C.A. 2); *N.L.R.B.* v. *Preston Feed Corp.*, 309 F. 2d 346, 349-350 (C.A. 4); *Town*

In sum, there is substantial evidence in the record to support the findings of the Board. In light of respondent's knowledge of Wetherill's organizing activities, the personal hostility expressed by its officials toward him because of these activities, respondent's coercive antiunion conduct, the timing of the discharge, and the circumstances surrounding the discharge, the Board was clearly justified in finding that the discharge was motivated by discriminatory reasons.

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the Board's order in full.

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November 1965.

& Country Mfg. Co. v. *N.L.R.B.*, 316 F. 2d 846 (C.A. 5); *N.L.R.B.* v. *Whitin Machine Works*, 204 F. 2d 883, 885 (C.A. 1).

Certificate

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

.....

Marcel Mallet-Prevost
Assistant General Counsel
National Labor Relations Board

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Unfair Labor Practices

Sec. 8.(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

* * * *

Prevention of Unfair Labor Practices

Sec. 10(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging

in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

* * * *

(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.

* * * *

Sec. 14(c)(1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving

any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided*, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

APPENDIX B

This appendix is prepared pursuant to Rule 18(f) of the Rules of this Court. References are to pages of the original transcript of record ("Tr.").

General Counsel's Exhibits	Identified	Offered	Received
1(a)-1(f)	5	5	5
2(a)	7	6-7	7
2(b)	8	8	8
2(c)	8	8	8
3	171	171-172	172
3(a)-3(b)	246	246	246
4	900-901	902-903	903

Respondent's Exhibits	Identified	Offered	Received
1	198	199	199
2	227	.....	.....
3	316	.....	.....
4	330	332	332
5	334-336	336	336
6	355	356	357
7	362	363	367
8(a)-8(h)	399	401	407
9	408	409	410
10	423	424	425
11	431	432	432
12	518	518	519
13	519	520	522
14	535	.....	.....
15	662	662	662
16	760	764	764

Charging Party's Exhibits	Identified	Offered	Received
1	492	.....	.....
2	496-497	508	509
3	932	932	932

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